

Exhibit 135

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

HERMÈS INTERNATIONAL and)
HERMÈS OF PARIS INC.,)
)
Plaintiffs,)
)
vs.) No.
) 1:22-CV-00384-JSR
MASON ROTHSCHILD,)
)
Defendant.)
-----)

September 23, 2022
9:32 a.m.

Deposition of BLAKE GOPNIK, held at the
offices of Baker & Hostetler LLP, 45
Rockefeller Plaza, New York, New York,
pursuant to subpoena, before Laurie A.
Collins, a Registered Professional Reporter
and Notary Public of the State of New York.

1 Gopnik

2 and then counsel may proceed.

3 B L A K E G O P N I K ,

4 called as a witness, having been duly sworn

5 by the notary public, was examined and

6 testified as follows:

7 EXAMINATION BY

8 MR. FERGUSON:

9 Q. Good morning. Can you please state
10 your full name for the record? 09:34:13

11 A. Blake Gopnik.

12 Q. Dr. Gopnik, have you been deposed
13 before?

14 A. No.

15 Q. Have you ever testified in court 09:34:23
16 before?

17 A. No.

18 Q. Do you have an understanding of what's
19 going to be taking place at this deposition today?

20 A. I believe I do. 09:34:33

21 Q. And is that understanding based on
22 information provided to you in conversation with
23 the counsel representing you today?

24 A. Yes.

25 Q. I'm just going to review a few ground 09:34:44

1 Gopnik

2 strike that.

3 Are you aware -- I'm going to start
4 again.

5 Are you aware of any other experts 10:32:22
6 retained by defendants in this case?

7 MR. SPRIGMAN: Objection.

8 A. I'm thinking for a minute. I honestly
9 don't remember if anyone has mentioned other
10 experts or not. 10:32:48

11 Q. Are you aware of any surveys being
12 conducted on behalf of defendants in this case?

13 MR. SPRIGMAN: Objection.

14 A. No.

15 Q. In connection with preparing your 10:33:24
16 report, did you speak to anyone other than the
17 attorneys for defendant?

18 MR. SPRIGMAN: Objection.

19 A. No.

20 Q. Did you know Mason Rothschild prior to 10:33:54
21 being retained in this case?

22 A. Know in what sense?

23 Q. Had you ever met him personally?

24 A. No.

25 Q. Since you've been retained have you 10:34:11

1 Gopnik

2 in its entirety.

3 I may have misanswered that. If you
4 would like to ask it again, I can think about it
5 one more time.

11:52:11

6 Q. If you would like to clarify your
7 answer, please go ahead.

8 THE WITNESS: Can you read his question
9 again?

10 (Record read.)

11:52:30

11 MR. SPRIGMAN: Same objection.

12 THE WITNESS: I think my former answer
13 holds.

14 MR. FERGUSON: I'm at a breaking point
15 now.

11:52:42

16 MR. SPRIGMAN: Okay. Great. Thank
17 you.

18 THE VIDEOGRAPHER: We're going off the
19 record at 11:53 a.m.

20 (Recess taken from 11:53 to 12:04.)

11:52:57

21 THE VIDEOGRAPHER: We're back on the
22 record at 12:04 p.m.

23 Q. Dr. Gopnik, I'd like to refer again to
24 the first paragraph of your report --

25 A. Indeed. Yes.

12:04:05

1 Gopnik

2 Q. -- where you refer to the images in
3 NFTs produced and sold by Mason Rothschild. You
4 state, quote, find their natural and obvious home
5 among the artistic experiments carried out by 12:04:28
6 modern artists over the last century.

7 Why is it obvious that the NFTs
8 produced and sold by Mason Rothschild find their
9 home among artistic experiments carried out by
10 modern artists over the last century? 12:04:33

11 MR. SPRIGMAN: Objection, misstates the
12 report.

13 A. They are similar to art synergistic
14 experiments and play a similar role in artistic
15 culture. 12:05:09

16 Q. Is it your understanding that this
17 similarity is obvious?

18 A. Within the art world, within --
19 within -- with a foreknowledgeable audience, yes,
20 and one always needs a knowledgeable audience for 12:05:25
21 anything to be obvious.

22 Q. Can you elaborate on what you mean by a
23 knowledgeable audience in the art world?

24 A. I think with substantial experience of
25 contemporary art, you might even say cutting-edge 12:05:50

1 Gopnik

2 contemporary art, art of the twentieth century.

3 Q. Are you referring to art critics?

4 A. I'm referring to art critics, some art
5 critics, some art historians, some artists. 12:06:17

6 There's a very large range within those categories
7 of people who are absolutely ignorant and people
8 who know a great deal.

9 Q. Would it be fair to say that this --
10 the statement in the first sentence of your first 12:06:46
11 paragraph is obvious to people who agree with you?

12 MR. SPRIGMAN: Objection,
13 argumentative.

14 A. No. There are people who disagree with
15 me for whom it would also be obvious. 12:06:59

16 Q. Are you saying that the statement in
17 the first sentence of your first paragraph
18 wouldn't be obvious to art critics who are
19 ignorant?

20 MR. SPRIGMAN: Objection. 12:07:16

21 A. Yes.

22 Q. As a layman is there any way for me to
23 determine which art critics are ignorant and which
24 ones aren't?

25 MR. SPRIGMAN: Objection. 12:07:30

1 Gopnik

2 A. Not for a layman, just as I wouldn't be
3 able to tell a knowledgeable sports reporter from
4 one who isn't knowledgeable.

5 Q. Are there any objective criteria that 12:07:53
6 can be used to distinguish a knowledgeable art
7 critic from an ignorant art critic?

8 A. I think if you looked at the course of
9 their career and saw if they were -- held
10 interesting, complex views about art, you'd say, 12:08:08
11 yes, this person is interesting and this other
12 person uses clichés, et cetera, and therefore is
13 not interesting.

14 (Discussion off the record.)

15 Q. Are you aware of any consensus among 12:08:57
16 art critics that the images in NFTs produced and
17 sold by Mason Rothschild find their natural and
18 obvious home among the artistic experience carried
19 out by modern artists over the last century?

20 A. There is no consensus among art critics 12:09:15
21 on pretty much any issue. For instance, I find
22 the Mona Lisa a fairly trivial object, and most
23 art critics would disagree with me.

24 Q. Referring to page 5, paragraph 11. The
25 first sentence begins, By the end of the 1960s, 12:10:02

1 Gopnik

2 A. I hope so.

3 Q. Does that definition appear in any
4 texts that you consider authoritative?

5 MR. SPRIGMAN: Objection. 01:18:58

6 A. I have to admit it has never occurred
7 to me to look for a definition of art in an
8 authoritative text. I've been studying art for 25
9 years, and I feel that I have enough experience to
10 understand it. It is extremely difficult to 01:19:10
11 understand, so everyone will have to arrive at a
12 definition that makes sense, because it's such a
13 thorny question.

14 Q. Have you ever heard the expression "art
15 is in the eye of the beholder"? 01:19:24

16 A. One of the sillier expressions I've
17 ever heard.

18 Q. I think I know the answer to this
19 question. Do you agree with that statement?

20 A. That art is in the eyes of the 01:19:36
21 beholder?

22 Q. Art is in the eye of the beholder.

23 A. I think it's a meaningless statement,
24 so I can't agree or disagree with it. I'm not
25 sure what it means. 01:19:47

1 Gopnik

2 Q. In your experience do different people
3 have different views of what they consider to be
4 art?

5 MR. SPRIGMAN: Objection. 01:20:04

6 A. Yes, absolutely. In the general
7 community, that's certainly true.

8 Q. Could you elaborate on what you meant
9 by "general community" in your last answer?

10 A. I was just trying to clarify my answer, 01:20:20
11 that I can't speak for every single human being on
12 the planet, and I'm fairly certain that there is
13 nothing in the world that everyone agrees on. And
14 one of the things that they might not agree about
15 are art. 01:20:33

16 Q. If two art critics disagree whether a
17 particular item is art, is there an agreed-upon
18 method in the art criticism profession for
19 resolving that dispute?

20 A. No. I think most sophisticated art 01:20:58
21 critics would think it was probably irresolvable.

22 Q. Do you have a definition of business
23 art?

24 A. Yes.

25 Q. What is your definition of business 01:21:19

Gopnik

component in his business art practice?

A. That is, Andy Warhol being a kind of a
trickster needed to pretend to be done with art in
order to become this new thing called a business 01:27:20
artist. So by saying it's the step that comes
after art, he was saying that -- well, there's two
things he was saying. One is that it's the latest
step in art, it comes after art because
traditional art was dead. In other words, he was 01:27:36
saying this is a knew avant-garde practice.

But he had to also present himself in part as a businessperson, someone who was no longer making art, in order for his business art to have its maximum resonance and complexity, and he did that reliably thereafter.

Q. Is making money an example of business art?

A. Not in every case, no.

Q. Can making money be an example of business art?

MR. SPRIGMAN: Objection.

A. Yes.

Q. In what circumstances is making money
an example of business art? 01:28:22

Gopnik

1
2 A. When it's incorporated into a practice
3 that where contextually you realize it has
4 resonance in -- when I was talking about the
5 definition of art, when it seems to have larger 01:28:35
6 resonance is something that can be discussed
7 outside of functional circles when it seems to
8 have a larger, I'm sorry to use the word, artistic
9 resonance, when there are clues that tell you
10 that's a useful way of considering it. 01:28:48

11 Q. What are the clues that tell you that
12 making money is business art?

13 A. When it seems to -- with that
14 particular act of making money seems to be part of
15 a transition that's a business art transition; 01:29:06
16 when it gets extra resonance in relationship to
17 history of other practices that are like business
18 art that involve those same sense of issues; when
19 there are contextual clues that tell you, wait a
20 minute, maybe this isn't straightforward, maybe I 01:29:23
21 need to think of this as a meta practice rather
22 than someone simply trying to make money.

23 Q. Are special training and qualifications
24 required to identify whether something is business
25 art or not? 01:29:43

1 Gopnik

2 Q. Do you need specialized background and
3 training to understand that Andy Warhol is not
4 making a normal statement here?

5 A. Yes. 01:34:20

6 Q. And what's the background and training
7 you need?

8 A. I don't know that you need any
9 training. You need to understand a lot about art
10 and how art works. And that's true to understand 01:34:27
11 any work of art.

12 Q. Is creating a corporation business art?

13 MR. SPRIGMAN: Objection.

14 A. It can be.

15 Q. In what circumstances is creating a 01:34:53
16 corporation business art?

17 A. If it is done in a context where
18 there's sufficient cues to let you know that in
19 fact a more interesting way of looking at it, a
20 forta [phonetic] way of looking at it, would be 01:35:07
21 from an artistic point of view rather than not.

22 Q. Do you need specialized training or
23 education to recognize these cues that you just
24 referred to?

25 A. Again, not training, but you need to 01:35:17

1 Gopnik

2 understand what art is and how it works.

3 Q. How do you get this understanding of
4 what art is and how it works in order to see these
5 cues?

01:35:29

6 A. You look at a lot of art, you think
7 about a lot of art, you read about art, you
8 immerse yourself in the world, in this case, of
9 twentieth century art, in this case a particular
10 part of twentieth century art. Again, that's true 01:35:40
11 of every piece of sculpture and painting of the
12 entire history of western art.

13 Q. Can the public sale of works at an
14 auction be art?

15 MR. SPRIGMAN: Objection. 01:36:02

16 A. They can be. They rarely are, but they
17 can be.

18 Q. And in your report on page 13, you give
19 an example of an auction conducted by Damien
20 Hirst; is that correct? 01:36:19

21 A. That is correct.

22 Q. Referring to paragraph 28. And that
23 art auction, the act of the auction was art? Is
24 that what you're saying?

25 A. Yes. 01:36:34

1 Gopnik

2 Q. Did you need specialized training or
3 experience to recognize that the act of that
4 auction was art?

5 A. You do not need specialized training, 01:36:48
6 but you need general experience of the nature of
7 contemporary art and of twentieth century --

8 Q. Do you need to immerse --

9 MR. SPRIGMAN: Wait a second.

10 Q. I didn't read realize you hadn't 01:37:00
11 finished. I'll stop.

12 Do you need to immerse yourself in the
13 world of contemporary art to recognized that
14 Damien Hirst's auction in September of 2008 was
15 business art? 01:37:14

16 A. Yes.

17 Q. Do you know if there is a consensus
18 among art critics as to whether the activities we
19 just talked about -- creating a corporation,
20 public sale of works -- is there a consensus as to 01:37:43
21 whether those activities can be art?

22 MR. SPRIGMAN: Objection.

23 A. Again, there's no consensus among art
24 historians about anything, including whether the
25 Mona Lisa is art, so there cannot be a consensus 01:38:00

1 Gopnik

2 on this either.

3 Q. One last activity I wanted to ask you
4 about. Can investing money in the stock market be
5 business art?

01:38:11

6 A. Yes, there are important cases of that
7 that have been documented.

8 Q. In what circumstance was investing
9 money in the stock market business art?

10 A. There was a work I believe in 1968 or 01:38:22
11 '69, several works, in fact, which were shown in
12 an exhibition, and I think one of the was shown at
13 the Whitney Museum of Art, that involved
14 specifically that activity.

15 Q. As a nonspecialist looking at a 01:38:42
16 business activity, how do I determine whether
17 something is -- that activity is business or
18 business art?

19 MR. SPRIGMAN: Objection.

20 A. You would have to look at -- well, as a 01:38:56
21 nonspecialist, as I said, a nonspecialist has no
22 sense of art. Most cultures don't have a concept
23 of art. You already have to know a great deal of
24 contextual information, contextual clues, to
25 understand a painting is art. It's not a category 01:39:13

1 Gopnik

2 that exists in most cultures.

3 In this particular subgroup, you have
4 to have knowledge of the history of business art,
5 for instance. You'd have to have knowledge of 01:39:22
6 other examples of business art. You would need to
7 understand those cues in order to understand what
8 you're confronting.

9 Q. Were you aware that Elon Musk has a
10 business that sells flame throwers? 01:39:56

11 A. I'm not sure. I think I vaguely heard
12 of that, but I'm just not sure.

13 Q. Is that business activity business art?

14 A. I imagine it probably isn't, because --
15 but I haven't studied it enough to be sure. It 01:40:15
16 could be he has a freelance activity as a business
17 artist on top of his activity as a businessperson.

18 Q. What additional information would you
19 need to determine if Elon Musk is engaging in
20 freelance activity as a business artist? 01:40:36

21 A. I'd have to see how it is being
22 perceived in the culture, the kind of social and
23 cultural context it was being presented in,
24 whether it seemed -- his statements might be
25 relevant or might not be relevant. He could lie, 01:40:51

1 Gopnik

2 appropriation art because the source could then
3 claim that there's been a copyright infringement.

4 Q. I want to refer you to the next heading
5 under why not just pay the fee. And you're quoted 01:49:08
6 as saying, Yeah, don't you just love it when
7 judges decide that they're art critics? I think
8 I'm going to sue them, you know, for taking over
9 my profession.

10 I'm assuming you were joking about the 01:49:26
11 lawsuit?

12 A. No, I'm going to absolutely sue them.
13 Yes, I'm sorry, I shouldn't answer facetiously.
14 Yes, I was joking about the lawsuit.

15 Q. What about the ruling in the Goldsmith 01:49:40
16 case indicated to you that judges were deciding
17 that they're art critics?

18 A. In the very strange decision from the
19 Second Circuit, they said that only collage art --
20 this is to distill out their argument -- that of 01:50:00
21 all the possible forms of art only collage was
22 significant enough artistic gesture to warrant
23 protection through fair use.

24 Q. And you disagree with that conclusion?

25 A. I do. 01:50:18

1 Gopnik

2 Q. In that decision were the judges
3 addressing the issue of what is fair use in the
4 meaning of the copyright law?

5 A. I believe so. I'm not a lawyer, but 01:50:33
6 that's my understanding.

7 Q. And that distinction that you made
8 about only collage art being permissible, that
9 distinction was based on the court's
10 interpretation of fair use; is that correct? 01:50:50

11 MR. SPRIGMAN: Objection.

12 A. That was my understanding.

13 Q. Is it your opinion that art critics and
14 not judges should make fair use decisions?

15 MR. SPRIGMAN: Objection. 01:51:07

16 A. No.

17 Q. Do you think that judges should consult
18 with art critics in making fair use decisions?

19 A. Yes.

20 Q. And why do you think that? 01:51:39

21 A. Because fair use, at least as of
22 relatively recently understood, involves the
23 concept of transformation. Transformation is
24 involves -- is an essentially artistic concept.

25 Therefore you need to have some notion 01:51:56

1 Gopnik

2 of what it would mean to transform something to
3 give it a new use. The fundamental notion of
4 transformation is that it has a new use. And if
5 the new use is an artistic use, then the judges 01:52:01
6 would want to know what the range of possible
7 artistic uses are.

8 Q. Which art critics should judges consult
9 with in making fair use decisions?

10 A. I can't give you a list of names. I 01:52:20
11 guess they would won't to poll a number of art
12 critics. I'm not sure. I haven't thought it
13 through that much. It will never happen.

14 Q. Why do you say that will never happen?

15 A. The truth is what I was trying to 01:52:41
16 articulate I think by saying that they should
17 consult with art critics is that the -- you know,
18 I'm not a lawyer, so I haven't thought this
19 through thoroughly.

20 There probably should be some criterion 01:52:54
21 that doesn't in the end require those kind of
22 judgments about whether collage or some other art
23 form is valid transformation. Fair use should be
24 broad enough so that those concepts don't apply.

25 I'm talking off the top of my head 01:53:11

1 Gopnik

2 here. I'm thinking as I talk.

3 Q. Referring to the next page where it
4 says, hoping the Supreme Court weighs in. I'm
5 looking at your statement that says, And maybe the 01:53:53
6 court should actually speak to a whole bunch of,
7 you know, art critics and collectors and curators
8 to try and figure out what kind of art we really
9 want to encourage in the future.

10 When you made that statement, did you 01:54:15
11 have an idea of how that outreach would occur?

12 A. No. And it's a fairly foolish
13 statement.

14 Q. With the opinion you've offered in this
15 case, are you seeking to advise the court and the 01:54:43
16 jury on what type of art they should encourage?

17 MR. SPRIGMAN: Objection.

18 A. Seeking to --

19 Q. Advise.

20 A. Advise them. Do you mean literally? I 01:54:55
21 have not been party to an amicus brief, though I
22 have been cited in an amicus brief.

23 Q. Do you have an understanding that your
24 opinion may be presented to the judge?

25 A. To the Supreme Court, you mean? 01:55:08

1 Gopnik

2 Q. What?

3 A. To the -- oh, I'm sorry, do you mean --
4 you don't mean -- I thought you meant the
5 Goldsmith case. 01:55:15

6 Q. I see we were miscommunicating.

7 A. Yes.

8 Q. In this case, the Hermès versus
9 Rothschild, do you understand your opinion may be
10 submitted to the judge? 01:55:26

11 A. Yes, I do.

12 Q. And what is your understanding of the
13 purpose of submitting that opinion to the judge?

14 A. I'm trying to think about what my role
15 is in this. To convince him of my particular 01:55:42
16 reading of what MetaBirkins are and how they
17 function in society.

18 Q. I think you said earlier that art
19 critics disagree with one another.

20 A. They do. 01:56:02

21 Q. Can you conceive that there would be
22 another art critic that would have an opinion that
23 the MetaBirkin NFT project is not art?

24 MR. SPRIGMAN: Objection.

25 A. Yes, and they would be wrong. 01:56:18

1 Gopnik

2 Q. How should a judge determine which art
3 critic is wrong?

4 MR. SPRIGMAN: Objection.

5 A. Just as in any other debate, there are 01:56:29
6 varied opinions about almost every single subject
7 that you can mention, including, I gather, legal
8 subjects. And the judge would look at the
9 entirety of my expert proposal and decide if it
10 seems cogent as an explanation of what's going on. 01:56:47

11 Q. Should the court talk to a bunch of art
12 critics and collectors and curators?

13 A. They could certainly if they wanted to.

14 Q. And how is the court going to determine
15 which art critics, collectors, and curators to 01:57:14
16 talk to?

17 MR. SPRIGMAN: Objection.

18 A. They could do the same thing they would
19 do in any case like this. They would look around,
20 see who seems to have interesting opinions, varied 01:57:26
21 opinions, so they can take different opinions into
22 consideration and decide which ones seem most
23 cogent.

24 Q. Are you aware of any circumstance where
25 a poll was taken of critics, collectors, and 01:57:45

1 Gopnik

2 curators to determine whether a particular item is
3 art?

4 MR. SPRIGMAN: Objection.

5 A. Yes, I am. 01:57:54

6 Q. And where was that done?

7 A. This was a poll taken about what the
8 most influential works of art of the twentieth
9 century were, and Marcel Duchamp's urinal
10 appropriation art was determined to be the most 01:58:06
11 influential work of twentieth century art.

12 Q. Where did that poll appear?

13 A. I'm sorry, I don't remember exactly
14 where it appeared. It was one of the art
15 magazines, I believe. 2014 I believe is the date 01:58:19
16 of the poll.

17 Q. And did this poll appear in an art
18 magazine you consider to be authoritative?

19 MR. SPRIGMAN: Objection.

20 A. I don't remember. 01:58:32

21 Q. Can art forgeries be art?

22 A. Yes.

23 Q. In what circumstances can art forgeries
24 be art?

25 A. Actually, I'll change the answer to 01:59:05

1 Gopnik

2 that. They can never be -- if they are art, they
3 are no longer forgeries.

4 Q. Can you elaborate on what you mean when
5 you say if they're art they're no longer 01:59:23
6 forgeries?

7 A. Yes, happily. The definition of art is
8 essentially a functional one. Most urinals are
9 not works of art; they're toilet appliances.
10 However, Marcel Duchamp's Fountain, which was just 01:59:38
11 a store-bought urinal, becomes art by virtual of
12 its recontextualization, the use it's put to in
13 the culture.

14 When a forgery is presented only in
15 order to make money for the forger or to deceive 01:59:49
16 someone, even if no money is involved, then it's a
17 forgery.

18 If an artist is making, for instance, a
19 perfect copy of another artist's work and it
20 credibly participates in a discourse that makes it 02:00:01
21 interesting, important, philosophically
22 informative, then though it is the same kind of
23 object that a forgery would be, it doesn't count
24 as a forgery, it's not functioning as a forgery.

25 Q. Is a forgery a work of art that is 02:00:20

1 Gopnik

2 attributed to someone who didn't create it?

3 MR. SPRIGMAN: Objection.

4 A. I'm just thinking for a minute. The
5 problem is the concept of create there is so broad 02:00:41
6 that it's hard for me to know exactly how to
7 answer the question.

8 Q. Let me show you a document we've marked
9 as Exhibit 190.

10 (Exhibit 190, article in The New York 02:01:00
11 Times by Gopnik, marked for identification.)

12 A. Yes, indeed.

13 Q. The first question I'd like to ask you
14 is about the second paragraph of the article.
15 Tell me when you're ready. Is this an article 02:01:32
16 that you contributed to The New York Times?

17 A. I believe it is. I haven't read the
18 whole thing, but I assume it is a complete version
19 of it.

20 Q. In the second paragraph, second 02:02:04
21 sentence, you state, But while forgery is very
22 clearly an economic crime, it may not always be an
23 artistic or aesthetic one.

24 What do you mean when you say the
25 forgery is not always an artistic crime? 02:02:18

1 Gopnik

2 A. That's a very general statement. I
3 don't mean one thing; I mean the substance of this
4 entire article, which has very -- there are many
5 different ways in which forgeries can be 02:02:29
6 informative, artistically, can do various
7 different kinds of cultural work. There are lots
8 of different ways in which they can be artistic.
9 And that is assuming something is a forgery. Not
10 everything that appears to be a forgery is in fact 02:02:44
11 a forgery.

12 So there's a lot of different aspects
13 of this.

14 Q. Could you elaborate on what you mean
15 when you say not everything that appears to be a 02:03:17
16 forgery is in fact a forgery?

17 A. Well, I think a lot of the time
18 appropriation art is mistaken for being a forgery
19 because it has so many of the same qualities as
20 forgeries have. 02:03:38

21 But, again, the definition of a forgery
22 is it's not functioning in fact as art at all;
23 it's functioning specifically and only
24 economically. That is the goal of the forgery is
25 to bring benefit to the forger, not in order to 02:03:48

1 Gopnik

2 NFT art simply does not exist?

3 A. It's an incoherent statement. I'm
4 sorry.

5 Q. Why is it incoherent? 02:58:27

6 A. I shouldn't say the statement is
7 incoherent. The statement "NFT art" is
8 incoherent.

9 Q. And why is the concept NFT art
10 incoherent? 02:58:38

11 A. Because, as with all concepts, it's
12 used in a particular way. People refer to NFT art
13 when what they really mean is the image that the
14 NFT is attached to. When people talk about NFTs
15 having certain artistic qualities, they are really 02:58:52
16 talking about the qualities of an image, except in
17 certain business art cases where the NFT itself is
18 playing a role and the NFTness is playing an
19 artistic role.

20 Q. How can we tell if an NFT itself is 02:59:08
21 playing a role and the NFTness is playing an
22 artistic role?

23 MR. SPRIGMAN: Objection.

24 A. By looking at the history of business
25 art in twentieth century art and seeing if the NFT 02:59:36

1 Gopnik

2 plays a role within that and if there's sufficient
3 cues to indicate that that's what's going on.

4 Most NFTs are simply contracts attached
5 to images, and people, when they talk about NFT 02:59:47
6 art, what they really mean is simply a JPEG. So
7 attaching the word "NFT" word to it is
8 inappropriate. There are some cases where the art
9 is the NFT itself as it circulates within the
10 cultural. 03:00:03

11 Q. Do you have to have a background in the
12 history of business art in the twentieth century
13 to determine whether an NFT is business art?

14 MR. SPRIGMAN: Objection.

15 A. Just as you have to have background in 03:00:31
16 art in any particular area in art to understand
17 the works at stake, so you need to have an
18 understanding of business art -- surprise,
19 surprise -- to recognize business art. You do
20 need some kind of knowledge of business art and 03:00:45
21 its history.

22 Q. Do you have a sense in the general
23 population how people understand business art?

24 MR. SPRIGMAN: Objection.

25 A. I don't have a sense in the general 03:00:55

1 Gopnik

2 A. I happen not to have, but it wouldn't
3 affect whether I thought it was satire or not.
4 Most social media comments on most art miss the
5 point of the art. 03:29:22

6 Q. Are the MetaBirkin NFTs, the
7 MetaBirkins NFTs, the actual NFTs, business art?

8 A. They do seem to function as that, yes.
9 That's the argument of my report.

10 Q. How do the MetaBirkins NFTs function as 03:29:47
11 business art?

12 A. By virtue of participating in the world
13 of business and deluxe commodities, commenting on
14 it, seeming to refer to it and also to have some
15 distance from it. 03:30:14

16 I'm trying to think. It's late in the
17 day for me to do sophisticated art criticism.

18 They have various markers that show
19 them interacting with that world but also having a
20 certain distance from that world. Those are 03:30:27
21 hallmarks of business art.

22 They seem to also, very importantly, be
23 continuous with other works in the history of
24 business art in the twentieth century. They seem
25 to live naturally and participate in dialogue with 03:30:39

1 Gopnik

2 those other works. In particular their pop art
3 qualities make you think immediately of Warhol and
4 his legacy.

5 Q. Is the fact that MetaBirkins were 03:30:58
6 traded and what that trading means part of their
7 status as business art?

8 MR. SPRIGMAN: Objection.

9 A. Yes, I would say they are. The one --
10 one -- not the only one but one component in 03:31:13
11 business art is the way in which it actually
12 participates in the financial world, just like the
13 investors, the artists who invest in money as a
14 form of art as an artistic medium in the late
15 1960s. That can be one component in business art. 03:31:27

16 Q. How is trading NFTs as a form of art
17 different from trading NFTs as a commercial
18 activity?

19 MR. SPRIGMAN: Objection.

20 A. The actual trading -- it's -- let me 03:31:46
21 think if I can say this clearly to you.

22 The act of trading you could say is the
23 art supply. So there are going to be people, for
24 instance, who might use oil paints to paint a wall
25 and they're not using it to make art. Other 03:32:02

Gopnik

people use oil paints to paint important,
interesting, philosophically complex objects.

Similarly, the act of trading NFTs
might be used as an art supply in business art. 03:32:13

But as with many, many aspects of business art especially, there are also practices that have nothing to do with the art world.

Obviously not every single transaction
on Wall Street is in fact participating in
business art, but some can be used as a medium, an
art supply for business art.

Q. How can I tell whether the selling of an NFT is a commercial transaction or business art?

03:32:43

A. You'd have to look at the larger context. For instance, you might choose to read my report for this case and decide if it seems credibly to participate in this larger discourse.

You might look at the way in which NFTs have been discussed, in fact, as art, which is quite important. Because NFTs have sometimes mistakenly discussed as art, the issue of art automatically arises.

That's not true of looking at football 03:33:07

Gopnik

MR. SPRIGMAN: Yeah, I want to get the answer first, and then let's figure out what to do.

THE VIDEOGRAPHER: 5 hours and 40	04:28:03
minutes.	

MR. SPRIGMAN: Okay. How much longer do you think you have, Jerry, just out of approximate?

MR. FERGUSON: I mean, I think if we 04:28:11
could take a break I could organize my notes.
I think I would have about ten minutes when I
got back.

MR. SPRIGMAN: Let's do it.

MR. FERGUSON: Okay. 04:28:20

MR. SPRIGMAN: Cool.

THE VIDEOGRAPHER: We're going off the
record at 4:29 p.m.

(Recess taken from 4:29 to 4:42.)

THE VIDEOGRAPHER: We're back on the 04:41:24
record at 4:42 p.m.

Q. Is adopting the trademark of another company business art?

MR. SPRIGMAN: Objection.

A. It might or might not be. 04:41:57

Gopnik

Q. In what circumstances is adopting the trademark of another company business art?

MR. SPRIGMAN: Objection.

A. I would say that it would almost always be a component in business art if business art is at stake, that is, any artist who seemed to be engaged in a business art project might or might even -- I might say should adopt a trademark of another company because it makes clear the stakes involved, that he's edge gauging directly -- he or she, I should say, is engaging directly with the world of commerce. It would be a good sign of what's going on.

And it would also -- frankly one
purpose of business art in general is critical or
satirical, and it would piss off the people that
he's talking to and then they would probably do
things like sue him and increase the cultural
importance of the business art by virtue of the
attention paid to it, the mess it's caused, the
fuss it's caused.

Q. Is taking actions that cause you to be sued business art?

MR. SPRIGMAN: Objection. 04:43:04

1 Gopnik

2 A. They might or might not be, but they
3 might be a very useful and interesting component
4 in business art.

5 Q. Did Andy Warhol adopt the trademark of 04:43:20
6 another company?

7 MR. SPRIGMAN: Objection.

8 A. He certainly used the trademark of
9 another companies, and sometimes those other
10 companies were uncomfortable with that. Sometimes 04:43:31
11 they were flattered by it. And the same company
12 at one moment be flattered and another moment be
13 uncomfortable.

14 Q. Did he ever adopt the trademark of
15 another company? 04:43:45

16 MR. SPRIGMAN: Objection, vague.

17 A. I don't know what that means, adopting.
18 Did he literally try to trademark another
19 company's extant trademark? No. But his works
20 certainly were presented as though he was using 04:43:53
21 that trademark.

22 And they did cause confusion, useful,
23 powerful confusion, that was part of the reception
24 in the art critical world. That's one reason they
25 matter is because they confuse the difference 04:44:08

1 Gopnik

2 between art and nonart.

3 Q. Is creating confusion regarding whether
4 a trademark owner has authorized goods business
5 art? 04:44:32

6 MR. SPRIGMAN: Objection.

7 A. I'd have to see a particular instance
8 of it. It might very well be.

9 Q. In --

10 A. A component in business art. Nothing 04:44:48
11 freestanding is or is not business art. You'd
12 have to look at a larger set of art supplies that
13 go into a project to decide the extent to which
14 any one of them is necessary or interesting or
15 useful in determining creating that work of 04:45:02
16 business art.

17 Q. Did you review the plaintiff's
18 complaint as part of the documents you reviewed in
19 preparing for your report?

20 A. I did. 04:45:15

21 Q. Did you see the allegations that Elle
22 magazine and the New York Post and other
23 publications printed stories saying that
24 MetaBirkins were offered by Hermès?

25 A. I don't remember your complaint in 04:45:30

1 Gopnik

2 roles. He was in a rich, collaborative
3 relationship. He was functioning as a high-level
4 studio assistant. That's what studio assistants
5 do.

04:51:53

6 Q. Is business art recognized as a genre
7 in the field of art criticism?

8 MR. SPRIGMAN: Objection.

9 A. Yes, it goes by various different
10 names. Most genres do. It's also called commerce 04:52:49
11 by artist. Some people might call it a branch of
12 relational aesthetics. But it's well recognized
13 as a movement or component in the history of
14 contemporary art. There have been exhibitions
15 about it; there are books about it. 04:53:04

16 Q. Is commerce by artists the same thing
17 as business art?

18 A. There is no specific definition of
19 business art or of commerce by artists. There are
20 elaborate -- you know, there are a set of, as it 04:53:15
21 were, Venn diagrams.

22 Different people might have slightly
23 different ways. That's true of minimalism, pop
24 art. Name any kind of art you could name, and
25 there would be different ways of thinking about it 04:53:27

1 Gopnik

2 conceptual art doesn't address that.

3 Q. At the beginning of the day, which I
4 know seems like a long time ago now, we went
5 through the different publishing you've done for 04:55:13
6 different periodicals and newspapers, and you've
7 produced quite a high volume of critical essays,
8 podcasts, interviews, probably in the thousands.
9 Does that sound right?

10 A. Total, yes. 04:55:30

11 Q. I'm trying to understand why we only
12 received four articles that have the phrase
13 "business art" in it.

14 A. Because I'm a general purpose art
15 critic, my guess is if you asked me about any 04:55:47
16 particular component in art, if you asked me about
17 renaissance art, I might have produced five or
18 six.

19 My interest in business art, also my
20 specialization, comes largely in the last ten 04:55:58
21 years versus earlier, though I think some of the
22 articles do predate that.

23 Q. Okay. Just give me 30 seconds.

24 (Pause.)

25 Q. Referring again to the article we 04:56:57

Gopnik

marked as Exhibit 189, which is the article about the Prince fair use dispute.

MR. SPRIGMAN: Give us a moment.

A. Sorry, I've made a mess of the documents. I haven't been keeping them in order; I should have done.

MR. SPRIGMAN: Yeah, well, I haven't done a great job of it either. There we go.

A. Once I dig down deep enough into this, 04:57:26
I'll find it. It has a rather striking image on
it, after all.

MR. SPRIGMAN: It does indeed.

A. This might be it. Yes, I've got it.

Q. In that article you were discussing a copyright case; is that correct? 04:57:46

A. That is correct.

Q. And you express the view that the court should speak to art critics, collectors, and curators to decide cases of fair use. 04:58:13

MR. SPRIGMAN: Objection, misstates the testimony.

A. I -- how can I put it? That wasn't meant as a serious advice to the Supreme Court of the United States or to the circuit court, for

Gopnik

that matter, because I didn't think it would ever happen.

But I was using it as a way of
suggesting that we have to take into account
artistic meaning and artistic context and
understanding transformation, that you can't
understand transformation without understanding
how people have transformed things.

Q. So are you saying your proposal in this article was not a serious proposal, that judges should reach out to art critics, curators, and collectors in determining whether use is transformative?

MR. SPRIGMAN: Objection. 04:59:13

A. I don't think I can call anything that I think will never happen a serious proposal. I don't imagine that that's the way the law operates. I can't imagine judges actually doing that.

But it is important for them to understand art and to think about art and maybe to look at the world of art to understand what transformation might be.

If they chose to consult with curators, 04:59:34

1 Gopnik

2 critics, and collectors, that of course would not
3 be a problem for me; it just would be very
4 unlikely to happen.

5 Q. In your article you referred to 04:59:44
6 consulting with a whole bunch of critics,
7 collectors, and curators. Would it be acceptable
8 for you to consult with just one critic, curator,
9 or collector?

10 A. I generally think that when judges -- I 05:00:02
11 know so little about how judges work, but my guess
12 is they'd want a range of possible opinions so
13 that they could weigh whose seemed more cogent.

14 Just like everything in life, there is
15 disagreement about everything. So you would weigh 05:00:18
16 a bunch of different opinions and try to figure
17 out what comes closest to the truth.

18 Q. Last exhibit.

19 (Discussion off the record.)

20 (Exhibit 207, text exchange between
21 Rothschild and Mark Design, marked for
22 identification.)

23 A. I'm not going to read this entire thing
24 right now, if that's all right with you.

25 Q. So what I'm showing you is an exchange 05:01:55

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C E R T I F I C A T E

STATE OF NEW YORK)

: ss.

COUNTY OF NEW YORK)

I, LAURIE A. COLLINS, a Registered
Professional Reporter and Notary Public
within and for the State of New York, do
hereby certify:

That BLAKE GOPNIK, the witness whose
deposition is hereinbefore set forth, was
duly sworn by me and that such deposition
is a true record of the testimony given by
the witness.

I further certify that I am not
related to any of the parties to this
action by blood or marriage and that I am
in no way interested in the outcome of this
matter.

IN WITNESS WHEREOF, I have hereunto
set my hand this 27th day of September
2022.



LAURIE A. COLLINS, RPR